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# THE SEPARATION OF POWERS AND CONSTITUTIONALISM IN AFRICA: THE CASE OF BOTSWANA

CHARLES MANGA FOMBAD\*

**Abstract:** This Article examines the doctrine of separation of powers and considers its relevance and significance in African constitutional practice, in particular its operation in Botswana. The Article outlines the doctrine's origins, nature, purposes, and its major modern manifestations. The Article then analyzes the separation of powers in Botswana and considers how the doctrine's operation in Botswana has contributed to the country's solid and sustained constitutional system and its reputation as Africa's most successful democracy.

## INTRODUCTION

One important fundamental preoccupation of constitutionalism is the avoidance of governmental tyranny through the abuse of power by rulers pursuing their own interests at the expense of the life, liberty, and property of the governed. A major challenge faced by constitutional engineers has been to design a system of governance that maximizes the protection of individual members of society while minimizing the opportunities for governments to harm them. Of the theories of government that have attempted to provide a solution to this dilemma, the doctrine of separation of powers—in some respects, a fairly late addition to the body of organizational prescriptions—has been the most significant both intellectually and in terms of its influence upon institutional structures. Although it is a doctrine with a long history and respected pedigree, a careful perusal of the abundant literature it has spawned shows that it is by no means a simple, immediately recognizable, or unambiguous set of concepts. In fact, modern scholars of the doctrine are not quite agreed on exactly what it means and its relevance to contemporary institutional development.

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Nevertheless, in the last two decades, African regimes caught in the wake of the so-called "third wave"<sup>1</sup> of democratization have tried to display their nascent democratic credentials by introducing new constitutions that apparently provide for a separation of powers.<sup>2</sup> This is not surprising, for the French considered this doctrine so important that Article 16 of their Declaration of the Rights of Man and of the Citizen of 1789 stated that any society in which the separation of powers is not observed "has no constitution."<sup>3</sup> While many scholars, like the French, will go as far as identifying the separation of powers with constitutionalism, many others, such as Geoffrey Marshall, feel that the doctrine is far too imprecise and incoherent to be useful in the analysis or critique of constitutions.<sup>4</sup>

Since 1966, Botswana has had a constitution that appears to provide for a separation of powers.<sup>5</sup> Botswana remains, by and large, Africa's most successful example of an open, transparent, and democratic

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<sup>1</sup> See Charles Manga Fombad, *Election Management Bodies in Africa: Cameroon's "National Elections Observatory" in Perspective*, 3 AFR. HUM. RTS. L.J. 25, 26 n.1 (2003). Professor Samuel Huntingdon coined the expression in SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 21 (1991). Professor Huntingdon defines a "wave of democratization" simply as "a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period." *Id.* at 15. He identifies two previous waves of democratization: a long, slow wave from 1828–1926, and a second wave from 1943–1962. *Id.* at 16. Most consider the "third wave" to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Professor Larry Diamond calls a "second liberation." Larry Diamond, *Developing Democracy in Africa: African and International Perspectives*, Presented at the Workshop on Democracy in Africa in Comparative Perspective, at Stanford University 2 (Apr. 27, 2001), at <http://democracy.stanford.edu/Seminar/DiamondAfrica.htm>; see also HUNTINGDON, *supra*, at 21; Larry Diamond, *Is the Third Wave Over?*, 7 J. DEMOCRACY 20, 20–21 (1996) (discussing the third wave of democratization and the necessity of preventing a reverse wave). The "first liberation" in this respect was the grant of independence to African countries in the early 1960s. See, e.g., Larry Diamond, *Introduction*, in *DEMOCRATIZATION IN AFRICA*, at ix, xxiv (Larry Diamond & Marc F. Plattner eds., 1999).

<sup>2</sup> For a recent example of the meaning and implications of the separation of powers in the Cameroonian Constitution of January 18, 1996, see Charles Manga Fombad, *Cameroon*, in 2 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONSTITUTIONAL LAW 1, 33–34 (2003).

<sup>3</sup> Declaration of the Rights of Man and of the Citizen, Aug. 26, 1789, art. 16 (Fr.), available at [http://www.elysee.fr/elysee/anglais/the\\_institutions/founding\\_texts/the\\_declaration\\_of\\_the\\_human\\_rights/the\\_declaration\\_of\\_the\\_human\\_rights.20240.html](http://www.elysee.fr/elysee/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html) (last visited Apr. 12, 2005) [hereinafter Declaration of the Rights of Man].

<sup>4</sup> See GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 124 (1971). In fact, he concludes that the doctrine is "infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds." *Id.*

<sup>5</sup> See BOTS. CONST. §§ 30–56 (on the executive); *id.* §§ 57–94 (on parliament); *id.* §§ 95–106 (on the judiciary).

government.<sup>6</sup> Like many other African countries, however, it is marked by elements of personal government under an increasingly “imperial” president, who heads the Botswana Democratic Party (BDP), which has monopolized power since independence.<sup>7</sup> This has raised questions about whether the apparent separation of powers provided for in Botswana’s constitution is anything more than the hegemony of the executive over the other two branches of government. Is the doctrine of separation of powers a feature of the Botswana constitutional system, or it is merely an abstract philosophical inheritance that lacks both content and relevance to the realities of the country today?

To answer this question, as well as to appreciate fully the operation of the doctrine in Botswana, this Article briefly traces the origins, evolution, and purposes of the doctrine of separation of powers, as well as its main modern manifestations. The Article argues that the doctrine can now be regarded as a general constitutional principle that was never conceived, nor intended, to operate as a rigid rule or dogma. Mindful of this significant fact, the Article analyzes the structure of government in Botswana and examines the extent to which the doctrine operates within the executive, legislative, and judicial branches. What emerges from the analysis is that, despite the considerable scope for using the doctrine as a smokescreen for unconstitutional practices in Africa, Botswana is an excellent example of a country where the doctrine has strengthened the pillars of constitutionalism and good governance.

## I. THE ORIGINS, NATURE, AND PURPOSES OF THE DOCTRINE OF SEPARATION OF POWERS

Debates have raged over the centuries about the origins of the doctrine of separation of powers. Some ideas about the doctrine can be found in the writings of many writers and thinkers of the medieval

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<sup>6</sup> See, e.g., Larry Diamond, *Introduction*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA 5 (Larry Diamond et al. eds., 1988) (citing the Botswana government’s repeated “free and fair elections” and toleration of “open dissent . . . in a relatively liberal spirit”); Bureau of African Affairs, U.S. Department of State, *Background Note: Botswana* (Mar. 2005), at <http://www.state.gov/r/pa/ei/bgn/1830.htm> (“Botswana has a flourishing multiparty constitutional democracy.”).

<sup>7</sup> See KENNETH GOOD, *THE LIBERAL MODEL AND AFRICA: ELITES AGAINST DEMOCRACY* 14–15 (2002); Kenneth Good, *Enduring Elite Democracy in Botswana*, 6 DEMOCRATIZATION 50, 50–51 (1999); Sechele Teleka Sechele, *Deepening Democracy or Creeping Authoritarian Rule?: Media/Government Relations in Botswana in Historical Perspective* (2000) (unpublished MPA dissertation, University of Botswana) (on file with author); see also John D. Holm, *Botswana: A Paternalistic Democracy*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA, *supra* note 6, at 179, 179 (discussing the BDP’s role in Botswana).

period and middle ages in their search for the secrets of good government. Plato's ideas of a "mixed state," set forth in *The Republic*, are considered by some to be the ancestors of the doctrine.<sup>8</sup> Aristotle, while accepting Plato's idea of a mixed state as the only expedient way to ensure a stable and durable government, classed governmental functions into three categories: the deliberative, the magisterial, and the judicative.<sup>9</sup>

The main controversy over the origins of the doctrine, however, centers on those who argue that John Locke and earlier writers are responsible for only the rudimentary and incomplete form of the doctrine, and that Charles-Louis de Secondat, Baron de Montesquieu<sup>10</sup> created the normative theory of it as it is known today, as opposed to those who reject this two-pronged view.<sup>11</sup> The view that currently enjoys broad support contends that, while the roots of the doctrine can be traced to numerous English writers and philosophers before John Locke, the latter is the author of the modern doctrine. Locke's conceptualization of the doctrine in his famous 1690 *Second Treatise*,<sup>12</sup> came to be for his contemporaries and successive generations "the ABC of politics."<sup>13</sup> Likely influenced by the traditional twofold analysis of governmental powers common to writings of that time, he advocated placing

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<sup>8</sup> See GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 77 (4th ed. 1976). See generally PLATO, THE REPUBLIC (Benjamin Jowett trans., Vintage Classics 1991).

<sup>9</sup> See ARISTOTLE, THE POLITICS 68-73, 178-82 (T.A. Sinclair trans., Penguin Books 1962). This has led some writers to suggest that he originated the doctrine. See WILLIAM BONDY, THE SEPARATION OF GOVERNMENTAL POWERS 12 (Lawbook Exchange, Ltd. 1999) (1896); ARTHUR T. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 39 n.119 (1953) (citing others who believe that Aristotle originated the doctrine).

<sup>10</sup> See W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 66, 69 (1965) [hereinafter GWYN, SEPARATION OF POWERS]. Professor Gwyn quotes British translator Sir Ernest Barker, who writes in his translation of Otto Gierke's *Natural Law and the Theory of Society* that John Locke "simply seeks to distinguish, in thought, between the different functions of political authority," and that he was "dealing with the logical analysis of functions, rather than with the practical question of separation (or union) of the organs which exercise functions." *Id.* at 69. He also notes Edouard Fuzier-Herman's view that the "truly scientific understanding" of the doctrine had a "completely French source," that is, Montesquieu. *Id.* at 66.

<sup>11</sup> See, e.g., WILLIAM A. DUNNING, A HISTORY OF POLITICAL THEORIES: FROM LUTHER TO MONTESQUIEU 356 (1905) (describing Locke as treading "on new ground" in setting forth the doctrine of separation of powers); J.W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 93 (1964) (citing Carl Ernst Jarcke's assertion of Locke as the originator).

<sup>12</sup> See GWYN, SEPARATION OF POWERS, *supra* note 10, at 66-81 (discussing Locke's separation of powers); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 58-67 (1967) (discussing Locke's separation of powers).

<sup>13</sup> GWYN, SEPARATION OF POWERS, *supra* note 10, at 69 (attributing the phrase to Walter Moyle, in his *An Essay on the Lacedaemonian Government* (1698)).

the “federative” and executive power in the hands of the same person, but apart from legislative power.<sup>14</sup> Although Locke recognized the importance of a neutral judiciary, he did not define an independent judicial branch of government, and stopped short of what may be called the “pure” theory of separation of powers.<sup>15</sup>

It is Montesquieu, however, who can be considered to have given the doctrine its modern scientific form, and whose ideas substantially influenced the French and American Revolutions.<sup>16</sup> Claiming to base his exposition on his understanding of the British constitution,<sup>17</sup> he made two main contributions to the doctrine: he was the first to categorize governmental functions as legislative, the executive, and the judicial; and the first to analyze the relationship between the separation of powers and the balance of powers in terms of checks and balances.<sup>18</sup> He believed that those possessing power will grasp for more powers unless checked by other power holders, and thus a separation of powers could only be maintained if accompanied by the system of checks and balances.<sup>19</sup> Although Montesquieu was thus advocating what could be termed a “pure” form of separation of powers, as compared to that of John Locke, it is quite clear from his theory of checks and balances that he was not advocating a rigid separation in which the different organs work in isolation from each other, but rather a system in which they were working “in concert” with each other.<sup>20</sup>

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<sup>14</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 292–93 (Peter Laslett ed., 2d ed. rev. with amends. 1970) (1690); VILE, *supra* note 11, at 60. Locke saw “federative” power as a form of natural power over a state’s international relations, thus he located international and domestic executive power in the same person. *Id.* Locke’s “federative power” should be read as “executive power.” VILE, *supra* note 11, at 86. Locke was quite emphatic that the legislative and executive powers must be placed in distinct hands if liberty were to be preserved. *Id.* at 61.

<sup>15</sup> DAVID GWYNN MORGAN, THE SEPARATION OF POWERS IN THE IRISH CONSTITUTION 4 (1997).

<sup>16</sup> See BARON DE MONTESQUIEU, 1 THE SPIRIT OF THE LAWS bk. XI, at 160–96 (Thomas Nugent trans., J.V. Prichard ed., Fred B. Rothman & Co. 1991) (1914); see also GWYN, SEPARATION OF POWERS, *supra* note 10, at 100–28 (discussing Montesquieu and those following him); VILE, *supra* note 12, at 76–97 (discussing Montesquieu’s doctrine of separation of powers).

<sup>17</sup> See MONTESQUIEU, *supra* note 16, bk. XI, ch. 6, at 162. This claim is now regarded as flawed, because the eighteenth-century English constitution did not observe the separation of powers in the form that he propounded. See Eric Barendt, *Separation of Powers and Constitutional Government*, 1995 PUB. L. (U.K.) 599, 600.

<sup>18</sup> See generally MONTESQUIEU, *supra* note 16.

<sup>19</sup> See *id.* at 157–60.

<sup>20</sup> See GWYN, SEPARATION OF POWERS, *supra* note 10, at 110–12.

American independence provided a "high noon" in many respects for the development of the doctrine of separation of powers.<sup>21</sup> It was natural that the American revolutionaries after their hard-earned independence would not have the same trust in the legislature as the English did, nor would view the executive as somehow inferior or less representative than the legislature. Influenced by writers such as John Adams and the authors of *The Federalist Papers*, described as "the greatest work of American constitutionalism,"<sup>22</sup> the nation's founders viewed the doctrine of separation of powers in its "pure" form as the best institutional structure of government.<sup>23</sup> However, disagreements during the drafting of the federal constitution led to a compromise: the Constitution was to embody a moderate rather than a "pure" form of separation of powers, tempered by the idea of checks and balances.<sup>24</sup>

The classic formulation of the doctrine of separation of powers in its "pure" form is based on the fundamental idea that there are three separate, distinct, and independent functions of government—the legislative, the executive, and the judicial—which should be discharged by three separate and distinct organs—the legislature, the executive (or government), and the judiciary (or the courts).<sup>25</sup> Thus formulated, the doctrine means at least three different things.<sup>26</sup>

First, the same person should not belong to more than one of the three organs of government.<sup>27</sup> This, for example, implies that cabinet ministers should not sit in parliament.<sup>28</sup> Second, one organ of government should not usurp or encroach upon the powers or work of another.<sup>29</sup> This means, for example, that the judiciary should be in-

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<sup>21</sup> See MORGAN, *supra* note 15, at 5.

<sup>22</sup> See William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in SEPARATION OF POWERS—DOES IT STILL WORK? 65, 66 (Robert A. Goldwin & Art Kaufman eds., 1986) [hereinafter Gwyn, *Modern Forms*]. See generally THE FEDERALIST (Jacob E. Cooke ed., 1961).

<sup>23</sup> See generally GWYN, SEPARATION OF POWERS, *supra* note 10, at 116–28 (noting American writings on separation of powers); VILE, *supra* note 12, at 119–75 (discussing separation of powers in America); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212–24 (1989) (discussing separation of powers at time of the writing of the Constitution); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 394–414 (1935) (describing founding fathers' thoughts on separation of powers).

<sup>24</sup> MORGAN, *supra* note 15, at 6.

<sup>25</sup> E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 50 (2001).

<sup>26</sup> See *id.* at 53.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

dependent of the executive, and ministers should not be responsible to parliament.<sup>30</sup> It also means that a person holding office in one organ of government should not owe his tenure to the will or preferences of persons in any of the other organs. Thus, the continuation in office of ministers or members of parliament should depend on the will of the electorate at general elections. Third, one organ of government should not exercise the functions of another.<sup>31</sup> For example, ministers should not exercise legislative powers.<sup>32</sup> Although the doctrine has rarely been practiced in this extreme form, it does represent a sort of “bench-mark” or an “ideal-type” situation from which to appreciate its present application today.<sup>33</sup>

Five main reasons have historically been given for requiring that the legislative, executive, and judicial functions should not be exercised by the same people: the rule of law, accountability, common interest, efficiency, and balancing of interests.<sup>34</sup> These rationales begin to illustrate why the doctrine of separation of powers has, in practice, emerged in different forms over the centuries.

Under the “rule of law” version of the doctrine, those who make law should not also judge or punish violations of it, and vice versa. As the classic common law principle asserts, “no man shall be a judge in his own cause.”<sup>35</sup> The rule of law rationale requires limits on executive discretion, but as Professor Joseph Raz has pointed out, it does not necessarily extinguish executive discretion, nor prevent lawmaking by the executive.<sup>36</sup> For example, the executive may take discretionary action or make legal rules or orders, as long as they act within the limits of the powers given to them by the law.

The accountability rationale for the doctrine of separation of powers is closely linked to the rule of law. For example, if the legislature is to perform its function of calling delinquent government

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<sup>30</sup> WADE & BRADLEY, *supra* note 25, at 53.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 53 (stating that complete separation of powers is impossible).

<sup>34</sup> GWYN, SEPARATION OF POWERS, *supra* note 10, at 127–28; Gwyn, *Modern Forms*, *supra* note 22, at 68–70. Professor Gwyn provides a full discussion of this issue in these two works, to which this account is indebted.

<sup>35</sup> This legal maxim is translated from the Latin phrase “*nemo iudex in causa sua*.” See THE FEDERALIST NO. 80, *supra* note 22, at 538 (Alexander Hamilton) (“No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.”).

<sup>36</sup> See Joseph Raz, *The Rule of Law and Its Virtue*, in JOSEPH RAZ, THE AUTHORITY OF LAW 210, 219 (1979).



officials to account, these officials should not dominate (or even be in) the legislature. Thus, they will not be judges in their own cases.<sup>37</sup>

The "common interest" theory of the separation of powers was developed in the late seventeenth and early eighteenth centuries in England to prevent factions or groups within parliament from pursuing their own rather than the common interest. The separation of executive and legislative powers was thought to protect the common interest, insofar as the legislature is more accountable to the people.<sup>38</sup> Today, however, the pursuit of private interests by different factions within parliament is not necessarily a bad thing, so long as it forms the basis of bargaining and compromises that reconcile the different interests. To this extent, the common interest version may still be valid, unless particular groups pursue and exercise greatly disproportionate influence that is prejudicial to the rest of society.<sup>39</sup>

Governmental efficiency was one major reason for the development of the doctrine in the seventeenth and eighteenth centuries. The efficiency rationale is based on the assumption that the different functions of government require different qualities, and must therefore be performed by different organs.<sup>40</sup> For example, the executive function was thought to require secrecy, expertise, and dispatch, but these characteristics were not necessary to other organs of government.<sup>41</sup> Today, the efficiency argument no longer plays an influential role.<sup>42</sup>

Finally, the "balancing of interests" version of the doctrine was influenced by the English theory of the mixed constitution, which gave the legislative powers jointly to the monarch, the House of Commons, and the House of Lords.<sup>43</sup> Within this tripartite legislature, checks and balances were supposed to operate within the different groups.<sup>44</sup> For example, royal veto of legislation was seen as an executive check on the legislature, while the legislature by calling the executive to account and approving taxes, was able to place a check on the executive as well. Montesquieu formulated this balancing argument thus:

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<sup>37</sup> See GWYN, SEPARATION OF POWERS, *supra* note 10, at 40–46, 60–61, 77–78, 126–27.

<sup>38</sup> *Id.* at 39–40, 45, 89.

<sup>39</sup> See generally MARK HOLLINGSWORTH, *MPs FOR HIRE: THE SECRET WORLD OF POLITICAL LOBBYING* (1991) (discussing the privatization of power in Britain).

<sup>40</sup> See GWYN, SEPARATION OF POWERS, *supra* note 10, at 28, 31–35.

<sup>41</sup> See *id.* at 33, 37.

<sup>42</sup> See Sharp, *supra* note 23, at 397–413.

<sup>43</sup> See MORGAN, *supra* note 15, at 2–3.

<sup>44</sup> See *id.*

Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.<sup>45</sup>

Political theorists and writers, from Plato and Aristotle to Locke, Montesquieu, John Adams, the American Federalists, and contemporary writers were driven by one central purpose: the desire to avert tyranny. This prevention of tyranny through the diffusion of power is the common thread that unites the five different historical justifications for separating the legislative, executive, and judicial functions of government. This remains true even though some rationales, such as accountability and balancing of interests, are not always compatible with each other, and historical contexts and institutional solutions have necessarily differed. Part II of this Article describes the three most influential models of the doctrine of separation of powers that have emerged, and examines various manifestations of the effort to diffuse and divide power.

## II. THE MODERN MANIFESTATIONS OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers was never conceived as a rigid rule that completely prevents one organ of power from performing any of the functions normally performed by the other. In fact, Montesquieu, in advocating for a separation of the three functions of government using England as an example, could hardly have envisioned absolute disjunction between the three functions, since this was certainly not the case in England at the time he wrote.<sup>46</sup>

One political science professor has abstracted from historical experience a threefold classification into which modern governments that have adopted the doctrine can be classified.<sup>47</sup> The first is the American system, the model and prototype of presidential government, generally regarded as having gone farther than any other in embodying

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<sup>45</sup> MONTESQUIEU, *supra* note 16, bk. XI, ch.6, at 162.

<sup>46</sup> See generally GWYN, SEPARATION OF POWERS, *supra* note 10 (indicating the mingling of the three branches in England at the time of Montesquieu's writings).

<sup>47</sup> See Gwyn, *Modern Forms*, *supra* note 22, at 72–78.

the fundamentals of the doctrine of separation of powers.<sup>48</sup> The second type is the British parliamentary, or Westminster model, which appears to contradict the doctrine by fusing or concentrating powers.<sup>49</sup> The third is the assembly or convention government that can be traced to England during the Interregnum<sup>50</sup> and France in the 1870s, but was typical of the former Soviet Union and its allies until their collapse in the 1990s.<sup>51</sup> It suffices to note here that the assembly government system has generally been considered to reject the whole concept of separation of powers.<sup>52</sup> Within these three types lie numerous hybrids, prominent among them being the French Fifth Republic Constitution of 1958, which combines a parliamentary system with the element of a strong and elected president.<sup>53</sup> Some salient features of the American presidential system, the British parliamentary system, and the French hybrid system are examined briefly below.

#### A. *The American Presidential System*

The doctrine of separation of powers is clearly expressed in the U.S. Constitution of 1787. Article I vests the legislative powers in Congress, consisting of the House of Representatives and the Senate; Article II vests the executive powers in the president; and Article III confers judicial powers in the Supreme Court and such other lower courts that may be established by Congress.<sup>54</sup> The president is elected separately from Congress for a fixed term of four years and may therefore be from a different party from that possessing the majority in either or both Houses of Congress.<sup>55</sup> He cannot however, use the threat of dissolution to compel Congress's cooperation.

Notwithstanding the emphatic, and sometimes unqualified terms in which the doctrine of separation of powers is expressed in the U.S. Constitution, even a cursory examination of the relevant provisions

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<sup>48</sup> *Id.* at 73, 74.

<sup>49</sup> *See id.* at 75–76.

<sup>50</sup> The Interregnum (1649–1660) was a period in which England was literally “between reigns,” and as Lord Protector, Oliver Cromwell ruled Britain as a republic; during this time, however, the type of government that would ultimately come to rule England and Scotland was indeterminate. *See* JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 135–141 (1999) (describing the uncertainty of the Interregnum).

<sup>51</sup> *See* Gwyn, *Modern Forms*, *supra* note 22, at 76–78.

<sup>52</sup> *Id.* at 76.

<sup>53</sup> JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 14–20 (1992).

<sup>54</sup> U.S. CONST. arts. I, II, III.

<sup>55</sup> *See id.* at art. II, § 1.

reveals that the regime contemplated is far from a rigid separation of powers.<sup>56</sup> This is manifested in several ways with respect to each of the three organs of power.

As regards the executive, neither the president nor his officers may sit or vote in Congress.<sup>57</sup> The vice president is the only member of the executive who, as president of the Senate, is empowered to vote when they are divided equally, and thus to exercise limited legislative power.<sup>58</sup> The president cannot directly initiate bills, but he may recommend legislation to Congress.<sup>59</sup> He can also exercise limited control over the legislative function through his right to veto legislation, although this can be overridden by a two-thirds vote in both Houses.<sup>60</sup> The executive does, however, wield substantial regulatory and adjudicatory power pursuant to congressional delegations of authority to administrative agencies.<sup>61</sup> The president also exercises control over the judiciary through his power to grant reprieves and pardons for federal offenses, and more importantly, to nominate federal judges.<sup>62</sup>

With respect to the legislative power, Congress controls the executive's exercise of legislative powers to amend or repeal statutes that authorize executive agencies. Congress controls the budget and conducts oversight hearings.<sup>63</sup> The Senate checks the executive further through its right to approve treaties negotiated by the president, as well as its right to approve appointments by the president of ambassadors, judges, and other senior officers.<sup>64</sup> Each House has the right to punish its own members for contempt and thus exercises some form of judicial power.<sup>65</sup> The Senate is allocated additional judicial powers, possessing the sole power to try impeachments.<sup>66</sup> In addition to these internal judicial powers, the Congress has the power to create and regulate the lower federal courts.<sup>67</sup>

Regarding the judicial power, although the judiciary has not been allocated specific or general supervisory powers over the execu-

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<sup>56</sup> *Id.* at arts. II, III.

<sup>57</sup> *See id.* at art. I, § 6, cl. 2. Similarly, a judge cannot serve simultaneously in Congress and as an executive. *See id.*

<sup>58</sup> U.S. CONST. art. I, § 3, cl. 4.

<sup>59</sup> *See id.* at art. II, § 3.

<sup>60</sup> *Id.* at art. I, § 7, cl. 2.

<sup>61</sup> *See* BONDY, *supra* note 9, at 145–48.

<sup>62</sup> U.S. CONST. art. I, § 2, cls. 1, 2.

<sup>63</sup> *See id.* at art. I, § 8, cl. 1, § 9, cl. 7.

<sup>64</sup> *See id.* at art. II, § 2, cl. 2.

<sup>65</sup> *See id.* at art I, § 5.

<sup>66</sup> *See id.* at art. I, § 3, cl. 6.

<sup>67</sup> U.S. CONST. art. III, § 1.

tive, it may use its general equitable jurisdiction to issue writs of mandamus against executive officers to ensure that they perform their constitutional duties.<sup>68</sup> Perhaps the most important judicial check on executive action is the authority to enforce compliance with the constitutional guarantees embodied in the Bill of Rights, which include the rights to due process of law, freedom of speech, and the right to a jury trial.<sup>69</sup> The judiciary also controls legislative action through its power to declare statutes unconstitutional.<sup>70</sup> As in Britain and Botswana, discussed below, the common law doctrine of judicial precedent, or *stare decisis*, enables the judiciary to set precedents that have a quasi-legislative effect. Outside the constitutional arena, however, congressional action can nullify judge-made law.

In this way, the American presidential system, instead of isolating each organ from the other two, provides for an elaborate system of checks and balances. In the words of James Madison, in *The Federalist*:

From these facts by which Montesquieu was guided it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" or "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.<sup>71</sup>

This is based on the "open recognition that particular functions belong primarily to a given organ while at the same time superimposing a power of limited interference by another organ in order to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic manner."<sup>72</sup>

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<sup>68</sup> See *id.* at art. III (specifying no powers of the judiciary over the executive).

<sup>69</sup> See *id.* amends. I, V, VI; *Marbury v. Madison*, 5 U.S. 137, 176–80 (1803).

<sup>70</sup> See the famous judgment of Chief Justice Marshall in *Marbury*. See 5 U.S. at 180.

<sup>71</sup> THE FEDERALIST NO. 47, *supra* note 22, at 325–26 (James Madison).

<sup>72</sup> CONSTITUTIONAL LAW: TEXTBOOK 18 (Jane Blessley ed., 1990) [hereinafter CONSTITUTIONAL LAW].

### B. *The British Parliamentary System*

The same three fundamental governmental powers exist in Britain, just as they do in the United States. However, the extensive fusion and overlapping between the authorities in which the powers are vested has led many to question whether the doctrine of separation of powers is really a feature of the British constitutional system.<sup>73</sup> Because of this fusion or concentration of legislative and executive powers, there is no strict separation of powers in Britain on the scale provided for in the U.S. Constitution. However, the impact of the doctrine of separation of powers on the British constitutional system can be seen from three perspectives.

The first examines the relationship between the legislature and the executive. The Queen, the nominal head of the executive, is an integral part of parliament, as is the Prime minister.<sup>74</sup> Ministers, also part of the executive, must by convention be members of one of the two Houses of Parliament.<sup>75</sup> The parliament controls the executive by its power to oust a government by withdrawing parliamentary support.<sup>76</sup> Other forms of parliamentary control over the executive include question time, select committees, adjournment debates, and opposition days.<sup>77</sup> The executive may also exercise considerable legis-

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<sup>73</sup> See *id.* at 14. For example, Stanley de Smith, a scholar of constitutional law, asserts that "no writer of repute would claim that it is a central feature of the modern British system of government." *Id.* The weight of opinion today favors the contrary view. According to the British judge Lord Diplock, "it cannot be too strongly emphasiz[ed] that the British constitution, though largely unwritten, is firmly based upon the separation of powers . . . ." *Duport Steels Ltd. v. Sirs*, [1980] 1 W.L.R. 142, 157.

<sup>74</sup> See A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 253–54, 260–61, 274–80 (12th ed. 1997); *CONSTITUTIONAL LAW*, *supra* note 72, at 14. This type of executive is referred to as "two-headed."

<sup>75</sup> See BRADLEY & EWING, *supra* note 74, at 185. The House of Commons Disqualification Act limits the number of ministers who may sit in the House of Commons to ninety-five, which is about fifteen percent of the total number of members of Parliament. See House of Commons Disqualification Act, 1975, ch. 24, § 2 (Eng.); BRADLEY & EWING, *supra* note 74, at 185.

<sup>76</sup> *CONSTITUTIONAL LAW*, *supra* note 72, at 14.

<sup>77</sup> *Id.* at 15. Modern scholars characterize question time, in which members of parliament question the prime minister on controversial issues, as "resembl[ing] presidential press conferences." Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, Lecture in Accordance with the George P. Smith, II, Distinguished Visiting Professorship—Chair of Law and Legal Research Endowment (Apr. 12, 2000), in 8 *IND. J. GLOBAL LEGAL STUD.*, 2001, at 323, 335; see Douglas W. Vick, *Anglicizing Defamation Law in the European Union*, 36 *VA. J. INT'L L.* 933, 965 (1996). Select committees are committees of backbench members of parliament (party members without official government positions) designated to investigate policy or administrative issues and produce detailed reports. See generally House of Commons Information Office, United Kingdom Government, *Factsheet*

lative functions through the making of statutory instruments, based on powers vested on it by parliamentary acts and the power to dissolve the House of Commons.<sup>78</sup>

The second perspective considers the relationship between the executive and the judiciary, and reveals an absence of a strict separation between the two. For example, as head of the judiciary, the Lord Chancellor is entitled to preside over the House of Lords when the latter is sitting as a court, and is also a member of the cabinet.<sup>79</sup> As a member of the House of Lords, he also belongs to the legislature, and is thus effectively part of all three powers.<sup>80</sup> The executive exercises some control over the judiciary through the appointment of its members.<sup>81</sup> The courts do exercise, however, considerable control over the executive by protecting citizens against unlawful acts of government agencies and officials, and, if proper application is made, by an aggrieved citizen, by reviewing executive acts for conformity with the law.<sup>82</sup>

Finally, the relationship between the judiciary and the legislature also manifests some of the features of an admixture of functions that is typical of the British parliamentary system. As noted above, the Lord Chancellor heads the judiciary, is a member of the House of

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P2: *Departmental Select Committees* (Dec. 2003), available at <http://www.parliament.uk/documents/upload/p02.pdf>. Adjournment debates are initiated by backbench members to raise issues related to his or her constituency or to matters of public concern. See United Kingdom Government, *The Accountability of Government: Backbench and Opposition Opportunities in the Commons*, at <http://www.parliament.uk/works/account.cfm> (last updated July 6, 2004). Opposition days are days allocated specifically to allow members of an opposition (non-majority) party to voice concerns. See *Opposition Days*, BBC NEWS, Mar. 8, 2000, at [http://news.bbc.co.uk/1/hi/uk\\_politics/a-z\\_of\\_parliament/m-o/82595.stm](http://news.bbc.co.uk/1/hi/uk_politics/a-z_of_parliament/m-o/82595.stm).

<sup>78</sup> See BRADLEY & EWING, *supra* note 74, at 94.

<sup>79</sup> *Id.*

<sup>80</sup> See *id.*; CONSTITUTIONAL LAW, *supra* note 72, at 15.

<sup>81</sup> See *id.* For example, Magistrates and Circuit Judges are appointed by the Lord Chancellor; High Court Judges are appointed by the Queen on the advice of the Lord Chancellor; and Lords Justice of Appeal and Lords of Appeal in Ordinary are appointed by the Queen on the advice of the prime minister after consulting the Lord Chancellor. CONSTITUTIONAL LAW, *supra* note 72, at 15. They are protected, however, from arbitrary executive action in many ways. See BRADLEY & EWING, *supra* note 74, at 94. For example, superior judges continue to hold office for the duration of their "good behavior," and can only be removed by the Queen if both houses of parliament issue such an address to her. CONSTITUTIONAL LAW, *supra* note 72, at 15. The Act of Settlement of 1701 guarantees the financial independence of the judiciary by making their salaries "ascertained and established," meaning that their salaries are charged on the Consolidated Fund, which permanently authorizes their payment. Act of Settlement (June 12, 1701) (Eng.); CONSTITUTIONAL LAW, *supra* note 72, at 15.

<sup>82</sup> See BRADLEY & EWING, *supra* note 74, at 94-95; CONSTITUTIONAL LAW, *supra* note 72, at 15.

Lords, and presides over it when it sits as a legislative body.<sup>83</sup> Although parliament may control the judiciary by way of legislation affecting the judiciary, the fact that judicial salaries are authorized permanently deprives parliament of an important opportunity to annually review and possibly criticize judges.<sup>84</sup> Though the judiciary and the legislature generally do not exercise each other's functions, and the doctrine of legislative supremacy denies courts the power to review the constitutional validity of legislation, judges do exercise some lawmaking function in the process of interpreting and applying the law.<sup>85</sup> But the effect of any court decision may be altered by parliament both prospectively and retrospectively.<sup>86</sup> In addition, "[b]ecause of the [common law] doctrine of judicial precedent, the judicial function of declaring and applying the law has a quasi-legislative effect."<sup>87</sup>

Absent a written constitution, there is no formal separation of powers in Britain. Because of the close relationship between the legislative and the executive, there is no strict separation of powers between the two. Nevertheless, the legislative and executive function remain clearly distinct. The judiciary is also effectively separated from the other two, with the exception of the Lord Chancellor and the Law Lords, who may participate in the legislative debates of the House of Lords.<sup>88</sup> One scholar has even argued that the doctrine of separation of powers in Britain means nothing more than an independent judiciary.<sup>89</sup> The crux of the British conception of the doctrine, however, is that parliament, the executive, and the judiciary each have "their distinct and largely exclusive domain," and the circumstances where one

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<sup>83</sup> CONSTITUTIONAL LAW, *supra* note 72, at 16. It is worth noting that, except under certain circumstances specified in the Parliament Acts of 1911 and 1949, a bill may be presented for royal assent to become law only after both the House of Commons and the House of Lords have approved it. BRADLEY & EWING, *supra* note 74, at 207. The House of Lords, therefore, plays a very important role in the lawmaking process in Britain. For a comparative perspective, see S.E. FINER ET AL., *COMPARING CONSTITUTIONS* 59–64 (1995).

<sup>84</sup> CONSTITUTIONAL LAW, *supra* note 72, at 16; *see also* BRADLEY & EWING, *supra* note 74, at 59–64 (discussing legislative controls on the judiciary).

<sup>85</sup> *See* BRADLEY & EWING, *supra* note 74, at 96.

<sup>86</sup> *Id.* at 96.

<sup>87</sup> *Id.* at 97.

<sup>88</sup> *See* CONSTITUTIONAL LAW, *supra* note 72, at 15–16.

<sup>89</sup> *Id.* at 18. In fact, Professor Reginald Parker has argued that effective separation of powers in England dates from the passage of a statute making judges removable from office only through impeachment by parliament for misconduct. *See* Reginald Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 *RUTGERS L. REV.* 449, 450, 457 (1958).



exercises the functions of the other are the exception and dictated by practical necessity.<sup>90</sup>

### C. *The French Hybrid*

The United States' approach to the doctrine of separation of powers is, as we have seen, largely derived from the work of Montesquieu, a French intellectual. The doctrine has firm roots in French constitutional tradition, exemplified by the bold assertion in Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen that a society with no separation of powers is like one with no constitution at all.<sup>91</sup> The doctrine is enshrined in the current 1958 constitution of the Fifth French Republic.<sup>92</sup> However, the French understanding and application of the doctrine is markedly different from both the U.S. and British models. It is essentially a parliamentary system that provides for close cooperation between the executive and the legislature, rather than a strict separation of powers. It contains elements of parliamentarianism, such as a two-headed executive, the collective political responsibility of government to parliament, and the right of government to dissolve the lower chamber of parliament.<sup>93</sup> But the president of the republic plays a role that is hardly typical of a parliamentary regime. Several peculiarities of this system of separation of powers are notable.

Perhaps one of the most distinctive features of the French system is the position of the judiciary. Because of the poor reputation of royal courts (Parlements) before the French revolution, one of the first steps taken by the revolutionaries was to break the powers of these Parlements.<sup>94</sup> This was done by the famous Law of 16–24 August

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<sup>90</sup> See *R. v. Sec'y of State for the Home Dep't*, 2 All E.R. 244, 267 (1995).

<sup>91</sup> See Declaration of the Rights of Man, *supra* note 3, at art. 16.

<sup>92</sup> See generally FR. CONST.

<sup>93</sup> See *id.* at art. 8 (declaring the power of the president to appoint and dismiss the prime minister); *id.* at art. 12 (declaring the power to dissolve parliament); *id.* at arts. 34–40 (describing the limited legislative powers of parliament). The executive is controlled by the president of the republic, who appoints the prime minister from among the members of the national assembly (assembly). See *id.* at art. 8. The parliament is composed of the senate and the assembly, but in practice, the executive wields the most power. See *id.* at art. 24 (parliament consists of assembly and senate).

<sup>94</sup> See John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109–10 (1996). The obsessive fear of legal dictatorship through a "Government by Judges" was so strong that French judges are only required, in Montesquieu's words, to act as "la bouche qui prononce les paroles de la loi" [the mouth that pronounces the law]. *Id.* at 111–12. Stanford University law professor John Merryman describes the background of the present court system and the Parlements, and points out that the French legal system—in its pure

1790,<sup>95</sup> inspired in part by Montesquieu's conception of the separation of powers.<sup>96</sup> This law precludes ordinary courts from interfering with the work of government; an ordinary citizen aggrieved by some government action can seek a remedy only before the administrative courts, which exercise limited judicial, administrative (executive), and legislative functions. Perhaps the most serious effect of the somewhat obsessive French distrust of judges is that the limited control of the constitutionality of laws that does exist is exercised, not by a judicial, but rather a quasi-administrative body, the Constitutional Council (*Conseil constitutionnel*).<sup>97</sup>

Another unique feature of the French incorporation of the doctrine is that, instead of defining the areas in which the executive is empowered to promulgate regulations on its own initiative, it defines only the parliament's field of legislative competence. Outside this field, defined in article 34 of the constitution, the executive enjoys the competence to legislate on all other matters.<sup>98</sup> Thus, residuary legislative power lies not with the parliament, as it does in other countries, but with the executive.<sup>99</sup>

Article 64 of the constitution provides that the president of the republic is the guardian of the judiciary's independence.<sup>100</sup> This clearly suggests that the courts are not on the same level as the execu-

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form, a deviant from the European "jus commune" [common law]—is now returning to the European mainstream. *See id.* at 118.

<sup>95</sup> Law of Aug. 16–24, 1790, tit. II (Fr.).

<sup>96</sup> *See* Stephan Riesengeld, *The French System of Administrative Justice: A Model for American Law*, 18 B.U. L. REV. 48, 56–58 (1938). Article 13 of the 1790 law, still in force today, states that "judicial functions are and will remain forever separate from the administrative functions. The judges will not be allowed, under penalty of forfeiture, to disturb in any manner whatsoever, the activities of the administrative corps, nor to summon before them the administrators, concerning their functions." HENRY JULIAN ABRAHAM, *THE JUDICIAL PROCESS* 284 (7th ed. 1998) (quoting Riesengeld, *supra*, at 58); *see also* L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 46 (5th ed. 1998).

<sup>97</sup> *See generally* Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45, 45–92 (1986) (discussing the Conseil constitutionnel's nature as a court and comparing it to the U.S. Supreme Court); Charles Manga Fombad, *The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?*, 42 J. AFR. L. 172, 172–86 (1998) (offering an African perspective); François Luchaire, *Le Conseil Constitutionnel est-il une Juridiction?*, REVUE DE DROIT PUBLIC 30, 30–43 (1979) (offering a French perspective).

<sup>98</sup> *See* FR. CONST. arts. 34, 37.

<sup>99</sup> This residual power is exercised effectively by the prime minister, who has the right under article 39 of the constitution to introduce bills on behalf of the government to parliament. *See id.* at art. 39. Although members of parliament can also introduce bills, this is the exception rather than the rule. *See id.*

<sup>100</sup> *Id.* at art. 64.

tive, but rather below. Article 65 reinforces this supposition by making the president of the republic the head of the High Council of the Judiciary, the body responsible for recommending judicial appointments and enforcing judicial discipline.<sup>101</sup> This French deviation has been explained convincingly by the suggestion that the 1958 constitution did not envisage the French president as an executive officer, but rather as a person outside the classic tripartite division of legislative, executive, and judiciary.<sup>102</sup> The overall effect, however, is the grant of greater control of the judiciary by the executive than in the American or British models.

With the judiciary largely subordinate to the executive, the doctrine of separation of powers in France thus means little more than distinguishing between the legislative and executive branches of government. As a form of parliamentary democracy, this system allows close collaboration between the executive and legislative powers rather than a strict separation between the two, and skews the balance of power toward the executive.

### III. THE OPERATION OF THE DOCTRINE OF SEPARATION OF POWERS IN BOTSWANA

African constitutional systems have borrowed extensively from the leading Western constitutional models discussed above. What is remarkable is the extent to which these borrowed models have been adjusted and adapted to the conditions unique to each country. Thus, few African nations have adopted the U.S. presidential, the Westminster parliamentary, or the French semi-presidential and semi-parliamentary model in their respective entirety.

The constitution of Botswana implicitly recognizes the separation of powers by dealing with each organ of government in separate and

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<sup>101</sup> *Id.* at art. 65. The appointment of the nine members of the Conseil constitutionnel is divided equally among the president, the assembly, and the senate. *Id.* at art. 56.

<sup>102</sup> See JOHN A. ROHR, *FOUNDING REPUBLICS IN FRANCE AND AMERICA: A STUDY IN CONSTITUTIONAL GOVERNANCE* 89–92 (1995). Article 5 of the constitution supports this statement, giving the president the power to ensure that the constitution is respected and requiring him to “ensure, by his arbitration,” the regular functioning of governmental authorities as well as the continuance of the state. See FR. CONST. art. 5. The president must also serve as the guarantor of national independence, the integrity of the territory, and respect for community agreements and treaties. *Id.* To guarantee national independence, article 16 grants the president virtually unfettered power to act decisively on his own initiative at times of great peril. See *id.* at art. 16. To emphasize the president’s “imperial role,” article 68 removes presidential accountability for official actions except in the case of high treason. See *id.* at art. 68.

distinct provisions.<sup>103</sup> Like the French system, the Botswana model mixes the British parliamentary system with elements of the U.S. presidential system, but is much more similar to the British model with a number of unique features of its own. For example, the president is not elected by direct popular vote, as is done in France.<sup>104</sup> Analysis of the operation of the doctrine shows that, like in Britain, it mixes executive and legislative power and provides for the relative independence of the judicial power, although in quite dissimilar aspects.

#### A. *The Mixing of Executive and Legislative Powers*

The executive is easily the most important of the three branches of government, functioning chiefly to execute or carry out state functions. As the engine of the political system, its power has always required a check. One of the major reasons for Africa's dismal record on constitutionalism is the ease with which African leaders have managed to adopt imperial tendencies, enabling them to rule largely without legislative or judicial interference.<sup>105</sup> In spite of the existence of written constitutions, insufficient governmental accountability led to the inability to prevent abuses of power. In a constitutional dispensation of power based on a philosophy of constitutionalism and separation of powers, an effective system must not only define and limit executive powers, but also ensure that the executive operates within these bounds. This requires a judicious balance that grants the executive sufficient powers to discharge its mandate without overly inhibitive and paralyzing restrictions. In Botswana, the mixing of executive and legislative functions is integral to the process of providing checks and balances. Although this mixing has, at times, led to the same persons forming part of the executive and legislative branches, the system also contains mechanisms by which the two branches can control and thus check each other.

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<sup>103</sup> See BOTS. CONST. §§ 30–56 (executive); *id.* §§ 57–94 (legislature); *id.* §§ 95–107 (judiciary).

<sup>104</sup> See *id.* §§ 32–34; FR. CONST. art. 6. The president is chosen from and elected by members of Parliament. BOTS. CONST. § 32.

<sup>105</sup> See generally *The Evolving African Constitutionalism: Special Issue*, 60 REV. INT'L COMMISSION OF JURISTS (1998) (devoting the volume to the evolution of African Constitutionalism); Charles M. Fombad, *Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism*, Presented at the Organization of Social Science Research in Eastern and Southern Africa Conference on African Conflicts (Nov. 29–Dec. 1, 2004) (unpublished manuscript) (on file with author).

## 1. The Same Persons Forming Part of the Executive and Legislative Branches

A number of persons form part of both the legislative and executive branches. On the one hand, the state president (president) is vested with "the executive power of Botswana."<sup>106</sup> On the other hand, the president is also an *ex officio* member of parliament, with the power to speak and vote in all parliamentary proceedings.<sup>107</sup> Other principal officers of the executive, consisting of the vice president, ministers, and assistant ministers, are appointed by the president and are members of parliament.<sup>108</sup> Although the president may appoint the vice president and up to four ministers and assistant ministers from persons who are not MPs, such persons must qualify for and seek election to parliament.<sup>109</sup> If they fail to gain a parliamentary seat within four months of their appointment, they cease to hold executive office.<sup>110</sup> As "principal legal adviser to the Government of Botswana,"<sup>111</sup> the Attorney General is responsible for conducting prosecutions on the state's behalf,<sup>112</sup> and is also an *ex officio* member of parliament.<sup>113</sup> In effect, the president and ministers who are the chief executive officials are also members of the legislative branch. To avoid undue bureaucratic influence, however, civil servants and other salaried public employees must resign their offices before assuming a seat in parliament.<sup>114</sup>

The dominant position of the executive vis-à-vis the legislature is underscored by many members of parliament who are members of the executive as well. The constitution provides for sixty-one<sup>115</sup> mem-

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<sup>106</sup> BOTS. CONST. §§ 30, 47(1). The president is considered the head of state. *Id.* § 30.

<sup>107</sup> *Id.* §§ 57, 58(1).

<sup>108</sup> See *id.* § 39(1) (addressing the vice president's appointment); *id.* § 42(3) (addressing the appointments of ministers and assistant ministers).

<sup>109</sup> *Id.* §§ 39(1), 42, 43.

<sup>110</sup> *Id.* § 43.

<sup>111</sup> BOTS. CONST. § 51(2).

<sup>112</sup> *Id.* § 51(3)(a). Although the prosecutorial function is "conceptually closer to the judicial power in that it is quasi-judicial in nature," it is generally regarded as a part of the functions of the executive. See MORGAN, *supra* note 15, at 163-64, 267.

<sup>113</sup> BOTS. CONST. § 58(1).

<sup>114</sup> See *id.* § 62(e).

<sup>115</sup> Constitution (Amendment) Act of 2002, No. 12 of 2002 (Bots.) (amending § 58 of the constitution). Section 58 of the amended constitution provides for sixty-one members of parliament, consisting of fifty-seven elected members and four specially appointed members. BOTS. CONST. § 58. The president appoints the specially appointed members, following a procedure laid out in a schedule to the constitution. *Id.* § 58(2)(b). Although parliament consists of the assembly and a house of chiefs, the latter has no legislative

bers of parliament.<sup>116</sup> With a total of eighteen ministers and assistant ministers,<sup>117</sup> the executive constitutes nearly one-third of the members of parliament. The principle of collective responsibility<sup>118</sup> ensures that any motion<sup>119</sup> presented by the government will receive at least eighteen favorable votes.<sup>120</sup> Given its dominance, the present government rarely loses a vote and effectively controls the legislature. Unlike Britain, no statutory limits exist to restrict the number of ministers coming from parliament.<sup>121</sup> The chief drawback of this is that on a number of occasions, parliamentary sessions have had to be adjourned due to the absence of ministers who had gone out on official engagements.<sup>122</sup>

The extent of executive influence over the legislative branch is particularly evident in the lawmaking process. Although the parliament's principal function to make laws, as in most parliamentary democracies, the whole of this process—especially the most decisive pre-legislative stages—is controlled and driven completely by the executive.<sup>123</sup> Direct parliamentary participation in the lawmaking process is limited at best to the virtually ineffective exercise of introducing private member's bills, or at later stages, amending a government bill—

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power and functions primarily as an advisory body with special purview over tribal and customary law matters. *See id.* §§ 57, 77, 85.

<sup>116</sup> *See* BOTS. CONST. § 58. This excludes the Attorney General, who is an ex officio member of parliament, but has no vote. *See id.*

<sup>117</sup> There are fourteen ministers and four assistant ministers.

<sup>118</sup> The principle of collective responsibility is stated formally in section 50(1) of the constitution. D.D. NTANDA NSEREKO, *CONSTITUTIONAL LAW IN BOTSWANA* 96 (2002). Pursuant to this principle, cabinet members are jointly accountable to the assembly and public at large for government policies and decisions. *Id.* They are also jointly answerable for their colleagues' official actions and for the legal implementation of those decisions or policies. *See id.*

<sup>119</sup> A motion is a formal proposal put before parliament for a vote, and is a measure used to increase government accountability. *See* NSEREKO, *supra* note 118, at 183.

<sup>120</sup> "Backbench" members of parliament are supporters of the ruling party who are members of parliament, but do not hold executive office and are not officially part of the government. *See* NSEREKO, *supra* note 118, at 66 ("Backbench MPs are potential Cabinet members. They would be careful to not to jeopardize their chances of being appointed to Cabinet posts by being overly critical of the Executive.").

<sup>121</sup> *See* discussion *supra* note 75 and accompanying text.

<sup>122</sup> Under section 73 of the constitution, if less than one-third of the members of the assembly are present at any session, then the presiding member may adjourn the session. BOTS. CONST. § 73. Although it is not required that more than a third of members always be present, if fewer are present, and any member draws attention to that fact, then the session must be adjourned. *See* Bopa Reporters, *Live Parliamentary Proceedings on TV Will Be Costly*, DAILY NEWS (Bots.), Nov. 5, 2003, at 2.

<sup>123</sup> *See generally* Charles Manga Fombad, *Some Insights into Statutory Lawmaking in Botswana*, 27 J. FOR JURID. SCI. (S. Afr.) 70–78 (2002).

but this rarely affects the content or fundamental principles of the bill. Bills only become law with the assent of the president.<sup>124</sup> In the unlikely event that the president withholds assent, the bill is returned to parliament, who must resubmit it within six months.<sup>125</sup> When the bill is returned, the president has twenty-one days within which to assent, or failing this, automatically dissolve parliament and call fresh elections.<sup>126</sup> Thus, the possibility of a president refusing to assent to a bill is quite remote. Almost all bills are discussed in cabinet meetings chaired by the president, and are typically presented in parliament by a cabinet member, who, along with the whips,<sup>127</sup> ensures the bill goes through without significant modifications. Because of the executive's ability to ensure that desired legislation is passed, it is fair to conclude that, to all intents and purposes, the executive controls parliament.

## 2. The Executive Exercise of Legislative Functions

The principal area in which the Botswana executive performs the functions normally reserved for the legislature is in the making of legislation in the form of delegated or subsidiary legislation, or statutory instruments.<sup>128</sup> Although section 86 of the constitution empowers parliament to "make laws for the peace, order and good government of Botswana,"<sup>129</sup> over the years, it has entrusted the exercise of limited legislative powers to certain persons and subordinate bodies within the executive for various reasons. In fact, the bulk of subsidiary legislation today far exceeds legislation enacted by parliament in the form of parliamentary acts.<sup>130</sup>

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<sup>124</sup> BOTS. CONST. § 87.

<sup>125</sup> *Id.* § 87(4).

<sup>126</sup> *Id.*

<sup>127</sup> As are whips in British parliament, whips in the Botswana government are members of parliament responsible for ensuring that party members vote as the majority desires. *See, e.g.,* Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT'L L. 1, 8-9 (1999) ("Parliamentary discipline is reinforced by the political parties' Whips, who serve as links between the party leadership and the ordinary Members of Parliament. The Whips are influential in advancing the career of back-benchers and may bring their influence to bear in persuading Members to support the leadership's position . . .").

<sup>128</sup> Subsidiary legislation in Botswana may take the form of proclamations, regulations, rules, rules of court, orders, bylaws, or any other instrument made directly or indirectly under any enactment and having legislative effect. *See* Interpretation Act, Cap. 01:04, § 49 (1984) (Bots.).

<sup>129</sup> *Id.* § 86.

<sup>130</sup> *See generally* 84 BOTSWANA STATUTE LAW 2000 (Botswana Government Printer). This volume published all legislation made in 2000. It contains only fourteen acts of parliament, but includes eighty statutory instruments or subsidiary legislation.

Delegated legislation is an inevitable feature of modern governments for several reasons. First, the complex and protracted nature of the lawmaking process<sup>131</sup> and the pressure upon parliamentary time would cause the legislative machinery to break down if parliament attempted to enact every piece of legislation by itself. Second, legislation on certain technical topics necessitates prior consultations with experts and stakeholders. Granting some legislative powers to ministers and other select bodies facilitates this consultation. Third, in enacting legislation, the parliament cannot foresee every administrative or other difficulty that may arise, nor is parliamentary recourse feasible each time amendments to acts become necessary.<sup>132</sup> Finally, in emergencies, the government must be able to act promptly and effectively outside its usual powers without resorting to parliament.<sup>133</sup>

Although there is general agreement over the necessity of delegated legislation, real problems arise in reconciling it with the process of democratic consultations, scrutiny and control, which normal bills are subjected to before becoming law. Possible abuses of the powers of delegated legislation in Botswana are checked and controlled in three main ways. The first type of control is exercised before delegated legislation is published and comes into effect. For example, the Statutory Instruments Act of 1984 requires all statutory instruments to be printed and published in the *Government Gazette* before they come into force.<sup>134</sup> This Act also states that bylaws, usually made by local authorities, must be submitted to the Minister for approval before publication in the *Gazette*.<sup>135</sup> The second type of control is exercised by the parliament. According to the Statutory Instruments Act, all statutory instruments must be presented to parliament after they are written,

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<sup>131</sup> See generally Fombad, *supra* note 123.

<sup>132</sup> For example, section 11(2) of the Motor Vehicle Accident Fund Act of 1998 allows the minister to adjust the compulsory fuel levy as he sees fit rather than resorting to the parliament for the complicated process of amending the act to achieve this purpose. Motor Vehicle Accident Fund Act of 1998, § 11(2) (Bots.).

<sup>133</sup> See BOTS. CONST. § 17.

<sup>134</sup> Statutory Instruments Act, Cap. 01:04, § 3(1) (1984) (Bots.). The United States' analog is the Administrative Procedures Act; it requires, among other provisions, the publication of rules in the Federal Register and for congressional rejection of major rules. 5 U.S.C. §§ 551–559 (2005).

<sup>135</sup> Statutory Instruments Act § 30. The *Government Gazette* is published weekly by the Botswana Government Printer, and is the government's chief means of disseminating lawmaking and other policy-related information to the public. See Ministry of State President, Government of Botswana, *Government Printing and Publishing*, at [http://www.gov.bw/government/ministry\\_of\\_state\\_president.html](http://www.gov.bw/government/ministry_of_state_president.html) (last visited Apr. 14, 2005); see also NSEREKO, *supra* note 118, at 176.



and the parliament may pass a resolution within twenty-one days nullifying any of them.<sup>136</sup> In practice, however, this rarely happens, because these statutory instruments are rarely placed before the parliament. Furthermore, even when they are, members of parliament often do not have the time to examine them critically.

The third, and perhaps most effective method of controlling subsidiary lawmaking, is based on common law and exercised by way of judicial review. Individuals against whom a statutory instrument is being enforced may challenge its validity before the courts—even when the parliament has approved the legislation—if it is *ultra vires* or if the correct procedure was not followed in making it. Thus, in *Botswana Motor Vehicle Insurance Fund v. Marobela*, the Court of Appeal declared section 7(1)(a)(iv) of the Motor Vehicle Fund Regulations, created by the Minister, null and void for its inconsistency with the spirit and intent of the parent Act, the Motor Vehicle Insurance Fund Act of 1986.<sup>137</sup> The court made it clear that a regulatory authority could not “reduce, qualify, or diminish the rights conferred” by the parent statute.<sup>138</sup> In *Maauiwe & Another v. Attorney-General*, regulation 75(1) of the Prisons’ Regulation, to the extent that it prevented condemned prisoners from consulting with their legal representatives out of the hearing of prison officers, was considered unreasonable, beyond the scope of the provisions of the Prisons Act, and thus of no force and effect.<sup>139</sup>

Generally, as in *Marobela*, where the statutory instrument is deemed only partially illegal, the courts may sever the lawful from the unlawful part and leave the instrument operational.<sup>140</sup> If this is impossible, the entire instrument may be declared invalid. But whatever the approach, the end result is that the courts may prevent the executive from abusing the wide-ranging power to make subsidiary legislation.

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<sup>136</sup> Statutory Instruments Act § 9.

<sup>137</sup> [1999] B.L.R. 21, 29–30; see Motor Vehicle Insurance Fund Act (Act No. 30 of 1986) (Bots.).

<sup>138</sup> See *Marobela*, 1 B.L.R. at 29–30.

<sup>139</sup> After a second trial and the aid of advocates from Ditshwanelo, the Botswana Centre for Human Rights, the two men were acquitted of murder and released on March 21, 2005. Press Release: Maauiwe & Motswetla Acquitted and Discharged, Ditshwanelo–Botswana Centre for Human Rights (Mar. 22, 2005), available at [http://www.ditshwanelo.org.bw/index/Current\\_Issues/Death\\_Penalty/Maauiwe%20Motswetla%20%2022%20March%202005.htm](http://www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty/Maauiwe%20Motswetla%20%2022%20March%202005.htm).

<sup>140</sup> See, e.g., *Marobela*, 1 B.L.R. at 29–30.

### 3. The Legislative Control Over the Executive

Despite the executive's apparently dominant position, legislative control of the activities of the executive is the crux of the parliamentary system that Botswana has implemented. Although obscurely worded, section 50(1) of the constitution states that the cabinet shall be responsible to parliament "for all things done by or under the authority of the president, vice president or any minister in the execution of his office."<sup>141</sup> The requirement that all ministers be members of parliament is justified most often by the principle that the ministers are responsible collectively to parliament.<sup>142</sup> This allows parliament to control the conduct of cabinet members, and to check abuses of office, misconduct, mismanagement, and incompetence.<sup>143</sup> Although the constitution expressly provides only for collective responsibility, over time, parliament developed a practice of debating "motions of no confidence" against individual ministers.<sup>144</sup> This practice, however, ended in 1997 upon the passage of a government-sponsored motion to end it.<sup>145</sup> The government rightly argued that considerable time was wasted in debating motions of no confidence against ministers. Debates over these motions proved futile, because even when such motions passed they were unenforceable, as only the president has the "prerogative to appoint or dismiss" ministers.<sup>146</sup> This has not prevented the parliament from censuring individual members of the cabinet.<sup>147</sup> The principle of collective responsibility, however, generally causes the government to rally to the defense of any minister, even if clearly incompetent or unpopular.

The parliament's most potent weapon against the government is the power to oust it through a vote of no confidence. As provided for by section 92 of the constitution:

If the National Assembly at any time passes a resolution supported by a majority of all the Members of the Assembly who

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<sup>141</sup> See BOTS. CONST. § 50(1).

<sup>142</sup> *Id.*

<sup>143</sup> See *id.* For criticisms of this, see NSEREKO, *supra* note 118, at 90–91.

<sup>144</sup> See BOTS. CONST. § 50(1); see also NSEREKO, *supra* note 118, at 91 (discussing the purpose of motions of no confidence).

<sup>145</sup> NSEREKO, *supra* note 118, at 91. The motion read: "That this Honourable House resolve in accordance with the provisions of section 76(1) of the Constitution of Botswana to prohibit with immediate effect the tabling of motions relating to ministers and individual Members except as specified in the Standing Orders." *Id.*

<sup>146</sup> BOTS. CONST. § 43(c); NSEREKO, *supra* note 118, at 91.

<sup>147</sup> NSEREKO, *supra* note 118, at 91.

are entitled to vote declaring that it has no confidence in the Government of Botswana, Parliament shall stand dissolved on the fourth day following the day on which such resolution was passed, unless the President earlier resigns his office or dissolves Parliament.<sup>148</sup>

This provision, however, operates as a double-edged sword. A vote of no confidence not only leads to the automatic removal of the president, but also to the automatic dissolution of parliament and the holding of general elections within sixty days.<sup>149</sup> Practically, section 92 makes dissolution difficult by jeopardizing political stability. Thus, the likelihood of passing a vote of no confidence is extremely remote, not only because of the comfortable majority that the ruling BDP party has had in every parliamentary election since independence, but also because the opposition parties are weak and deeply divided.<sup>150</sup>

In spite of these impediments to legislative power, BDP backbenchers have on occasion pressured the government, leading to the introduction of several significant laws, and even compelling the government to withdraw some bills by threatening a backbench revolt.<sup>151</sup> Other, more common means that the Botswana parliament uses to hold the executive branch accountable are through parliamentary processes like question time, during which any private member of parliament may question a minister as to statements made on public matters, motions, or the use of standing committees, sessional select committees, or commissions of inquiry.<sup>152</sup> Although numerous other

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<sup>148</sup> BOTS. CONST. § 92.

<sup>149</sup> *Id.* §§ 90(3), 92.

<sup>150</sup> In the November 2004 elections, the opposition parties only captured thirteen of the fifty-seven elected seats, leaving the ruling BDP with an absolute majority of forty-eight seats (including the four specially appointed members). INDEP. ELECTORAL COMM'N, REPORT TO THE MINISTER OF PRESIDENTIAL AFFAIRS AND PUBLIC ADMINISTRATION ON THE 2004 GENERAL ELECTIONS 27 (2004). For a full discussion of the intricacies of the BDP's political control and the weaknesses of the opposition parties, see generally Brian T. Mokopagosi & Mpho G. Molomo, *Democracy in the Face of a Weak Opposition in Botswana*, 14 PULA: BOTS. J. AFR. STUD. 3 (2000); see also M.G. Molomo, *Political Parties and Democratic Governance in Botswana*, in AFRICAN POLITICAL PARTIES: EVOLUTION, INSTITUTIONALISM, AND GOVERNANCE 293-318 (M.A. Mohamed Salih ed., 2003).

<sup>151</sup> For a full discussion of this concept, see generally Fombad, *supra* note 123. It is highly unlikely that the backbench would revolt in a way that would threaten the government's majority in parliament. Nevertheless, the government would not want to appear arrogant or to be using its dominant position to force through measures its own backbenchers are unhappy with.

<sup>152</sup> See generally Standing Orders of the National Assembly of Botswana (Standing Orders) 26-31, 33-40, 90-94.

measures exist, however, they fail to ensure a fully accountable government.

### B. *The Independence of the Judicial Power*

The judicial branch is normally charged with the enforcement of the constitution and other laws, and to ensure that the other two branches act in accordance with them.<sup>153</sup> The ability of the courts to do this is by no means automatic, but instead is heavily contingent upon the judiciary's independence. As in Britain, the relative independence of the judiciary from both the executive and the legislature marks the extent to which the doctrine of separation of powers operates in Botswana. The only remarkable departure from this is the position of the Attorney General, who, in his or her capacity as an ad hoc member of parliament,<sup>154</sup> assists in presenting bills to parliament and addresses any legal questions raised.<sup>155</sup> He is also part of the executive, as he occupies a "public office" and acts as "the principal legal adviser to the Government."<sup>156</sup> Although not strictly a member of the cabinet as defined in section 44 of the constitution, he may be invited to participate in cabinet discussions if his legal expertise is required. The duties vested in him by the constitution to institute and undertake legal proceedings on behalf of the state, and thus to enforce the criminal law are executive, rather than judicial functions. These have, however, been referred to at times as quasi-judicial functions, because in discharging these functions, the Attorney General is expected to act as guardian of the general public interest and operate apart from any party political influence.<sup>157</sup> In this way, therefore, the Attorney General belongs to the executive, legislative, and judicial branches of the government.

As discussed below, though the judiciary enjoys considerable independence from the other two branches of government, it does not operate in a vacuum. Judicial independence does not mean judicial isolation. Hence, there are circumstances when the other two branches play a limited, but legitimate role in exercising functions usually attributed to the judiciary, as part of the checks and balances inherent to the separation of powers.

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<sup>153</sup> BOTS. CONST. §§ 105, 106.

<sup>154</sup> See *id.* § 51(3).

<sup>155</sup> See Standing Order 60(2).

<sup>156</sup> See BOTS. CONST. § 50(1), (2).

<sup>157</sup> See MORGAN, *supra* note 15, at 163–164, 267.

## 1. The Extent of Judicial Independence

Two barometers typically measure the judiciary's independence: personal independence and functional independence. The personal—sometimes referred to as the relational—independence of the judiciary is reflected by factors such as the nature of judicial appointments and the terms and conditions of service.

To the extent that the government appoints all the members of the Botswana judiciary to their positions, the executive controls the judiciary.<sup>158</sup> According to the Magistrates' Court Act of 1983, the president, acting in accordance with the advice of the Judicial Service Commission, may appoint qualified persons to any of the five grades of magistrates provided for under that Act.<sup>159</sup> The constitution also empowers the president alone to appoint the Chief Justice, who heads the High Court, but requires the president to consult with and obtain the advice of the Judicial Service Commission in appointing all other judges of the High Court.<sup>160</sup> The same anomaly exists with respect to the Court of Appeal, where the president appoints the judges in consultation with the Judicial Service Commission, but alone appoints the president of that court.<sup>161</sup> It is certainly not satisfactory for a politician acting in isolation to appoint the heads of the country's two highest courts without the benefit of the Judicial Service Commission's advice, and with no constitutional criteria to counter the influence of a desire for political expediency. This provision exposes judges so appointed to political manipulation, therefore placing the independence of the judiciary at risk.

Two factors work together, however, to limit these risks. First, there is a considerable degree of security of tenure. Judges of the High Court and Court of Appeal are appointed on permanent, pensionable terms, and hold office until they reach compulsory retirement at the age of seventy.<sup>162</sup> Lower court judges are on contract and hold office until their contracts expire.<sup>163</sup> Generally, a judge can only be removed from

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<sup>158</sup> It is important, however, to point out that this discussion is limited to the Common Law Courts and therefore excludes Customary Courts, where the position is more complicated. *See generally* Customary Courts Act, Cap. 04:05.

<sup>159</sup> Magistrates' Court Act, Cap. 04:04, § 8 (1983) (Bots.).

<sup>160</sup> BOTS. CONST. § 96(1).

<sup>161</sup> *See id.* § 100(1), (2).

<sup>162</sup> *See id.* §§ 97(1), 100(5).

<sup>163</sup> Because of an absence of trained local personnel, however, most judges are expatriates appointed on temporary contracts for two- or three-year terms. The possibility that their contracts might not be renewed has certainly influenced the work of some of these judges, especially when dealing with politically charged controversial constitutional mat-

office for the “inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour,” according to a fairly stringent procedure laid out in the constitution.<sup>164</sup> The Magistrates’ Court Act is silent with respect to the position of magistrates, but as civil servants, magistrates retire like other civil servants at the age of sixty.<sup>165</sup> They are removable by the president acting on the advice of the Judicial Service Commission, usually following a series of disciplinary hearings.<sup>166</sup>

The second factor that may explain the relatively high degree of judicial independence in Botswana is their financial independence. The salaries of judges, the Attorney General, and members of the Judicial Service Commission are charged to the Consolidated Fund,<sup>167</sup> which permanently authorizes their compensation and prohibits the government from reducing it arbitrarily to pressure or influence them.<sup>168</sup> Although the government appoints the Attorney General, the independence of the office is guaranteed constitutionally by section 51(7), which provides that in discharging judicial functions, the Attorney General “shall not be subject to the direction or control of any person or authority.”<sup>169</sup> Thus, the Attorney General, although part of the executive and the legislature, is independent of each.

Functionally, judges in Botswana are shielded from threats, interference, or manipulation intended to compel them to favor unjustly a party or the state in legal proceedings. Various acts of parliament bol-

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ters. In fact, these constitutional provisions providing for permanent tenured positions have hardly been strictly enforced. *See generally* BOJOSI OTLHOGILE, A HISTORY OF THE HIGHER COURTS OF BOTSWANA 1912–1990 vii (1991); Charles Manga Fombad, *Protecting Constitutional Values in Africa: A Comparison of Botswana and Cameroon*, 36 COMP. INT’L L.J. S. AFR. 83, 92 (2003); A.J.G.M. Sanders, *Constitutionalism in Botswana: A Valiant Attempt at Judicial Activism*, 16 COMP. INT’L L.J. S. AFR. 350 (1983).

<sup>164</sup> *See* BOTS. CONST. §§ 97(2), (3) (High Court judges), 101(2), (3) (Court of Appeal judges).

<sup>165</sup> *See* Public Service Act § 15(2)(a) (Act No. 13 of 1998) (1998) (Bots.). As in England, judges—appointed to superior courts of record—are distinguished from magistrates—appointed to the inferior magistrates’ courts. While judges must have a law degree and ten years of experience in practice, magistrates may be appointed from the rank of court officials without a law degree. Botswana’s system thus departs from the English system by allowing experienced senior magistrates with law degrees to be appointed judges, creating a sort of career judiciary.

<sup>166</sup> *See* BOTS. CONST. § 96(3).

<sup>167</sup> The constitution creates a Consolidated Fund, into which all revenues or other funds raised or received on behalf of Botswana’s government must be paid. *Id.* § 117; NSEREKO, *supra* note 118, at 330.

<sup>168</sup> *See* BOTS. CONST. § 122(5).

<sup>169</sup> *Id.* § 51.

ster their independence, boldness, and firmness in deciding cases by granting them immunity from civil and criminal proceedings.<sup>170</sup> They are protected against unwarranted external pressure by the offense of contempt of court, enabling them to cite offenders for contempt and commit to prison anybody who attempts to denigrate or flout their decisions.

## 2. Instances of Limited Mixing of Functions Between the Judiciary and the Executive

Although the Botswana judiciary acts relatively independently, a number of situations occur in which the executive and the judiciary exercise each other's functions. The scope for this overlapping appears fairly well defined.

The executive exercises limited judicial functions in two main ways. The first is the exercise of the presidential "prerogative of mercy."<sup>171</sup> These powers enable the president to:

- (a) grant to any person convicted of any offense a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
- (c) substitute a less severe form of punishment for any punishment imposed on any person for any offense; and
- (d) remit the whole or part of any punishment imposed on any person for any offense or of any penalty or forfeiture otherwise due to the Government on account of any offense.<sup>172</sup>

In exercising these powers the president generally has the discretion to consult the advisory committee on the prerogative of mercy. However, when any person has been sentenced to death, the president must order the advisory committee to consider a report of the

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<sup>170</sup> See, e.g., Customary Courts Act, § 46 (granting indemnity to officers acting judicially for official acts done in good faith and while executing warrants and orders); High Court Act, Cap. 04:02, § 25(1) (Bots.) (stating that a judge shall not be sued in any court for any act done by him or ordered done by him); BOTS. PENAL CODE § 14 (1986) (stating that a judicial officer is not criminally responsible for anything done or omitted in good faith in the exercise of his judicial functions).

<sup>171</sup> See BOTS. CONST. §§ 53–55. According to the constitution, the president has the power to pardon convicted criminals with or without condition, alter their sentences, or commute them altogether. See *id.*; NSEREKO, *supra* note 118, at 86–87.

<sup>172</sup> BOTS. CONST. § 53.

case on the prerogative of mercy, and can only exercise his powers of mercy after obtaining their advice.<sup>173</sup> The president is not, however, obliged to follow the Committee's advice. Should the president decline to exercise the prerogative, the president personally must sign the death warrant ordering the execution.<sup>174</sup> The exercise of the prerogative of mercy constitutes a serious interference with the judicial process, and is exercised only for good cause. Although the current president has exercised this prerogative often in decisions imposing prison sentences, he has generally been reluctant to intervene when the Court of Appeal has confirmed a death sentence. The practice so far suggests that only the most exceptional and unusual situation will cause the president to exercise his prerogative with respect to a death penalty passed by any of the superior courts.<sup>175</sup>

The second area in which the executive exercises some judicial functions is in the regular creation of administrative tribunals and other disciplinary bodies, and conferring on them the right to determine matters that traditionally come within the jurisdiction of courts of law.<sup>176</sup> In fact, many disputes arising within the public service today are not decided by litigation in the ordinary courts, but are decided by administrative bodies operating within the executive. For example, the Public Service Commission may undertake disciplinary proceedings and impose sanctions against public servants.<sup>177</sup> The courts have, however, repeatedly stressed their inherent or common law right to review the proceedings and decisions taken by these administrative bodies and tribunals, to ensure that they do not exceed the powers

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<sup>173</sup> See *id.* §§ 54–55.

<sup>174</sup> See Prisons Act, Cap. 21:03, § 117 (1980) (Bots.). Even after signing the death warrant, a convict may still apply to the president for mercy. *Ditshwanelo & Others v. Attorney-Gen. & Another*, [1999] 2 B.L.R. 59, 71. In *Ditshwanelo*, the High Court granted a stay of execution even after the president had signed the death warrant. *Id.*; see NSEREKO, *supra* note 118, at 86–87.

<sup>175</sup> For example, in 2001, President Festus Mogae resisted enormous international pressure to grant clemency to a white South African citizen, Mariette Bosch, whose death sentence for murdering her best friend had been confirmed by the Court of Appeal. Gideon Nkala, *Bosch Haunts OP*, MMEGI (Gaborone, Bots.), Apr. 12–19, 2001, at B1. Her application for clemency was rejected in a controversial manner, most likely to forestall further pressure; she was executed shortly afterwards. *Address Erosion of Democratic Principles—Mpho*, DAILY NEWS ONLINE (Bots.), July 19, 2001, at <http://www.gov.bw/cgi-bin/news.cgi?d=20010719>; *BBC Broadcasts Film—Featuring Bosch*, DAILY NEWS ONLINE (Bots.), July 19, 2001, at <http://www.gov.bw/cgi-bin/news.cgi?d=20010719>.

<sup>176</sup> The bodies are either created directly by parliament or by the executive, acting under powers conferred on it under an act of parliament.

<sup>177</sup> See BOTS. CONST. §§ 110–111; Public Service Act §§ 24–32.



conferred on them, and that they conform to the ordinary rules of natural justice.<sup>178</sup>

Because these broad executive powers exist, judicial control over the executive is now one of the most crucial features of any modern constitutional democracy. In Botswana, judicial control over executive action is exercised regularly to protect citizens against the unlawful acts of government officials or departments by ensuring that they perform their statutory duties and that in doing so they do not exceed their powers. In exercising this control, the Botswana courts have on several occasions nullified governmental acts that they considered to be unlawful.<sup>179</sup>

As regards the judiciary exercising executive functions, judges and other members of the judiciary have at times been appointed to discharge non-judicial functions falling within the executive domain. These appointments may be of a temporary or permanent nature, but both manifest in various ways and may provoke a range of problems.

One permanent appointment provided for by the constitution itself is section 38(1), which makes the Chief Justice the returning officer for purposes of presidential elections.<sup>180</sup> This provision gives the Chief Justice the right not only to determine questions that arise regarding compliance with the constitution or laws relating to the election of the president under sections 32 and 35, but also the validity of the election of any person as president.<sup>181</sup> Section 38(2) states that the Chief Justice's "decision shall not be questioned in any court," but the High Court maintains its inherent power to review and quash any decision, if procedural irregularities were present or the Chief Justice acted *ultra vires*.<sup>182</sup>

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<sup>178</sup> See, e.g., *Crown Paints v. Botswana Hous. Corp. & Others*, [1999] 2 B.L.R. 78, 81 (reviewing housing corporation's procedure for tendering supply and delivery of painting materials contracts); *Nyoni v. Chairman, Air Botswana Disciplinary Comm. & Another*, [1999] 2 B.L.R. 15, 24 (reviewing a disciplinary committee's decision); *Students' Representative Council v. Univ. of Botswana & Others*, [1989] B.L.R. 396; *Mosebola v. Attorney-Gen.*, [1988] B.L.R. 159. For further discussion of the government's sensitivity over this issue, see Sello Motseta, *Botswana's Democracy Losing Its Shine*, MMEGI (Gaborone, Bots.), June 28, 2001, at 40.

<sup>179</sup> See, e.g., *Molapisi v. Attorney-Gen. & Another*, [1999] 1 B.L.R. 519, 522-27; *Mbisana v. Attorney-Gen. & Another*, [1999] 1 B.L.R. 189, 200-02.

<sup>180</sup> BOTS. CONST. § 38(1).

<sup>181</sup> *Id.* §§ 32, 35, 38.

<sup>182</sup> *Id.* § 38(2). Another example is the appointment of the Chief Justice, under section 103 of the constitution, to serve as the chairman of the Judicial Service Commission. *Id.* § 103.

More often, however, judges and other members of the judiciary are appointed to preside over ad hoc commissions of inquiry, or over bodies or groups reporting on policy issues. A recent and controversial example was the appointment of a retired South African judge in 2001, to head what became known as the Khumalo Presidential Commission. The Commission investigated certain failings in the preparation of the 2001 referendum to amend certain provisions of the constitution.<sup>183</sup> The final report held the Attorney General responsible for some of the mistakes made.<sup>184</sup> For several months, there were reports of plans by the Attorney General to sue the president and government, allegedly to clear his name and reputation based on his absence at the Commission's hearings and lack of legal representation.<sup>185</sup>

Selection of members of the judiciary to perform some of these executive functions, such as the Chief Justice, reflects an intuitive desire to seek persons whose independence and impartiality in handling matters of public concern is recognized and accepted widely. Nevertheless, as is evidenced by these examples, the non-judicial responsibilities given to judges, especially those relating to investigatory tasks or controversial policies, may imperil the reputation and prestige of the judiciary.<sup>186</sup> Judges risk public identification with the policies of the group or body concerned in the investigation, or they may be put in a position of being seen as either critics or supporters of the government. There is also the risk that some judges' performance of these duties may be influenced by the expectation of elevation to a higher judicial office. In addition, the absence of a judge from regular

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<sup>183</sup> See Government Notice No. 404 (2001).

<sup>184</sup> *Id.* Among other tasks, the Commission was required to "identify, by name, the person or persons who are culpable or share in the culpability of the acts, errors or omissions," leading to the postponement of the referendum and the amendment of the writ of the referendum. *Id.*

<sup>185</sup> Subsequent newspaper accounts reported that an out-of-court settlement had been reached between the Attorney General and the office of the president. See generally *Open Letter to Phandu Skelemani*, MMEGI (Gaborone, Bots.), Jan. 25–31, 2002, at 21. This is not surprising, for in *Kwelagobe & Another v. Kgabo & Another*, the court held that by failing to inform the applicants that their conduct was under investigation, a commission of inquiry failed to observe the rules of natural justice and thus its proceedings were null and void. [1994] B.L.R. 129.

Another notable example was the Presidential Commission on the Judiciary of 1997, headed by the late Chief Justice Aguda. See REPUBLIC OF BOTSWANA, REPORT OF THE PRESIDENTIAL COMMISSION ON THE JUDICIARY (1998). In the White Paper following the Commission report's publication, the government accepted some recommendations but rejected others. See *Constitutional Changes Prompt Referendum, Says Mogami*, DAILY NEWS ONLINE (Bots.), July 12, 2001, at <http://www.gov.bw/cgi-bin/news.cgi?id=20010712>.

<sup>186</sup> See VANDERBILT, *supra* note 9, at 118–119.

duties in Botswana, a nation grappling with a shortage of competent judicial personnel, inevitably increases the workload of other judges and may encumber the disposition of cases.<sup>187</sup>

Moreover, such appointments could lead to confusion between the judicial and executive functions. For example, it is one thing for the constitution to name the Chief Justice as the returning officer for presidential elections, and quite another to grant him the sole authority to determine the validity of the president's election. On what basis should this determination be made: on the Justice's judgment as a returning officer, an executive position, or as a Chief Justice, a judicial position? Further, the fact that the president alone appoints the Chief Justice, without the obligation to consult anybody or follow objectively defined criteria must not be forgotten.

As the Khumalo Presidential Commission Report shows, non-judicial activities often produce and provoke dissension or criticism that threaten to undermine the prestige and respect of the judges involved, or even the judiciary as a whole. The controversy generated by the Khumalo Report certainly has not enhanced the reputation of Justice Khumalo, an otherwise well-respected judge. Because he was already retired and from a foreign jurisdiction, however, the damage was not as serious as it would have been if the criticism had been directed against an active judge. Upon resuming his or her regular duties, a judge who serves on a commission may feel compelled to adopt a position that justifies or defends the position taken while serving on the commission, regardless of its merits.

Be that as it may, judges and other members of the judiciary will continue to be appointed to discharge non-judicial functions, especially when these functions require some degree of legal expertise. To the extent that this occurs, it is desirable to use only retired judges or limit the participation of active judges to non-controversial policy matters, where there is little chance of endangering their reputation for independence and impartiality.

Judges also may perform executive functions in the review of the exercise of discretion by an administrative body. As noted above, the courts stress their common law right to review these proceedings and decisions. Courts intervene even when the statute establishing a particular tribunal or body purports to grant it exclusive jurisdiction, and states that its decisions are final and not subject to appeal or review by

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<sup>187</sup> See OTLHOIGILE, *supra* note 163, at 89, 98–102, 126–27.

the courts. Thus, in *Tafic Sporting Club v. Mokobi N.O. & Another*,<sup>188</sup> even though section 17(2) of the Botswana National Sports Council Act stated that the National Sports Council Appeals Board's decisions would be final, the Act did not deprive the court of its inherent powers to quash the board's decision, if the decision was ultra vires or erroneous. Typically, however, the courts do not exercise discretion that has been reserved exclusively for these administrative bodies.<sup>189</sup>

The general principle reiterated in *Arbi v. Commissioner of Prisons & Another* is that where the legislature has conferred discretion upon an administrative body, the courts would not attempt to substitute it with their own.<sup>190</sup> Nevertheless, exceptions exist where the courts, in an action for judicial review, may substitute their own decisions for that of an administrative body and indirectly perform functions reserved by the legislature for that body.<sup>191</sup> These situations are:

- (a) where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the administrative tribunal or authority to reconsider the matter;
- (b) where further delay would cause unjustifiable prejudice to the applicant;
- (c) where the administrative tribunal or authority has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
- (d) where the court is in as good a position to make the decision itself.<sup>192</sup>

In *Arbi*, the Minister of Labour and Home Affairs rejected an application for remission under section 53(d) of the constitution.<sup>193</sup>

<sup>188</sup> [1997] B.L.R. 177.

<sup>189</sup> See *Gogannekgosi v. Comm'r for Workmen's Compensation & Others*, [1993] B.L.R. 360, 361–62 (dismissing for lack of jurisdiction a claim to overturn a decision made on behalf of the minister under the Workmen's Compensation Act); *Attorney-Gen. & Another v. Kgalagadi Res. Dev. Co. (Pty.) Ltd.*, [1995] B.L.R. 234, 240 (stating that the proper approach to a proceeding involving the review of a Central Tender Board decision is to consider whether the allegations and remedy sought are within the general scope of "reviewable acts by public bodies").

<sup>190</sup> See generally [1992] B.L.R. 246.

<sup>191</sup> See *id.* at 255.

<sup>192</sup> See *id.*; NSEREKO, *supra* note 118, at 312.

<sup>193</sup> [1992] B.L.R. at 255–56. The Court of Appeal granted the appellants' request and set aside the decision of the responsible officers, after concluding that "another day's delay in the administrative process would . . . result in unwarranted incarceration of the appellant and [cause] severe prejudice." *Id.*

Clearly, the courts do sometimes exercise some administrative functions, though they will not do so unless a firm legal basis allows such action.

### 3. Instances of Limited Mixing of Functions Between the Judiciary and the Legislature

In certain situations, the judiciary or legislature may exercise some control over each other, or even exercise each other's functions. The legislature generally controls the judiciary by its ability to make legislation that regulates the judiciary. Nevertheless, as seen earlier, unlike other public servants in Botswana, the provision for payment of judges' salaries from the Consolidated Fund denies parliament an annual opportunity to discuss and criticize the activities of judges.<sup>194</sup> Judicial salaries can still, however be changed. In a period of rapid inflation such as that existing today, the purpose of this principle is not so much to guard against reductions in salaries, but rather to provide a mechanism by which salaries of judges can be increased at a pace commensurate to that of other public servants.<sup>195</sup> Therefore, salaries can be increased, but not reduced. Income tax is levied against a judge's salary in the same way as on the salaries of other members of the community, provided that doing so does not discriminate against judges. These principles attempt to insulate judges from parliamentary pressure, and are reinforced by a convention that protects judges from disparaging criticism in parliament. This does not mean that members of parliament, like ordinary citizens, should not criticize judges, but rather requires such criticisms to be fair and reasonable, and not made maliciously or in a way that brings unwarranted disrepute on the courts.<sup>196</sup>

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<sup>194</sup> As Alexander Hamilton explained, "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." *THE FEDERALIST* No. 79, *supra* note 22, at 531 (Alexander Hamilton).

<sup>195</sup> Over the last few years, inflation has been fairly steady at around 7.5%, but in 2003, it rose to 9.7%, causing the government to increase salaries by ten to twenty-five percent. Last year, however, inflation dropped to 6.7%. Unsurprisingly, the Minister of Finance and Development Planning made no mention of further salary increases in the 2005–2006 budget presented to parliament in February. *Modest Surplus for '05/'06*, *DAILY NEWS ONLINE* (Bots.), Feb. 8, 2005, available at <http://www.gov.bw/cgi-bin/news.cgi?d=20050208>; *BANK OF BOTS., 2 BOTSWANA FINANCIAL STATISTICS* 8 (Sept. 2004).

<sup>196</sup> See *In re Editor of Botswana Gazette & Another*, [1990] B.L.R. 655, 657 (noting that newspapers have published articles criticizing Botswana courts, which they have a right to do, but they should be "fair and reasonable").

Regarding the control exercised by the courts over the legislature, Botswana differs from Britain, where the doctrine of legislative supremacy denies the courts the power to review the validity of legislation. Although the constitution vests in parliament the "power to make laws for the peace, order and good government of Botswana,"<sup>197</sup> this does not include the power to make laws that contravene the constitution itself. As Justice I.A. Maisels said in *Desai & Another v. State*:

[T]he National Assembly is supreme only in the exercise of its legislative powers and these powers cannot override the rights and freedom of its citizens or other persons . . . which are entrenched in the Constitution.<sup>198</sup>

Thus, the courts have not hesitated to invalidate parliamentary enactments or subsidiary legislation inconsistent with the constitution. For example, in *Petrus & Another v. State*,<sup>199</sup> the Court of Appeal declared section 301(3) of the Criminal Procedure and Evidence Act void on the grounds that it infringed section 7(1) of the constitution, prohibiting torture, inhuman, or degrading punishment.<sup>200</sup> Again, in *Attorney-General v. Dow*,<sup>201</sup> the court also declared section 4(1) of the Citizenship Act void for violating the constitutional prohibition of discrimination in sections 3 and 15, because it denied citizenship to the offspring of Botswana<sup>202</sup> women married to foreigners, but granted citizenship to the offspring of Botswana men married to foreigners.

A third example, this time of subsidiary legislation, is the case of *Students' Representative Council of Molepolole College of Education v. Attorney-General*.<sup>203</sup> The Court of Appeal held that a college regulation, which required pregnant women to leave the college for at least one year, was contrary to section 15 of the constitution and therefore void.<sup>204</sup> In fact, section 105 of the constitution vests exclusive jurisdiction on the High Court and Court of Appeal to entertain any matter

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<sup>197</sup> See BOTS. CONST. § 86.

<sup>198</sup> [1987] B.L.R. 55, 62.

<sup>199</sup> [1984] B.L.R. 14, 18–19, 31.

<sup>200</sup> This section provided for corporal punishment in the form of strokes to be administered in the traditional manner using traditional instruments. Act No. 21 of 1982 (amending the Criminal Procedure and Evidence Act, Cap. 08:02, § 301(3) (1982) (Bots.)).

<sup>201</sup> [1992] B.L.R. 119, 127, 160.

<sup>202</sup> One citizen of Botswana is referred to as a Motswana, while multiple citizens are referred to as Batswana.

<sup>203</sup> [1995] B.L.R. 178, 195–96.

<sup>204</sup> *Id.* at 196.

involving constitutional interpretation.<sup>205</sup> But although this gives these courts the power to review all legislation and quash any that infringe any constitutional provisions, it does not give them power to nullify sections of the constitution itself.<sup>206</sup> Thus, the High Court in the recent case of *Kamanakao & Another v. Attorney-General*,<sup>207</sup> while expressing sympathy with the plaintiffs' case that sections 77, 78, and 79 of the constitution discriminated against certain tribes in the country, noted that it had no powers to order their amendment.<sup>208</sup>

In Botswana, the judiciary exercises traditionally legislative functions at times in two principal ways. The first—and probably the more common way—is through the doctrine of binding precedent, which came to Botswana as a part of the general adoption of English law during the colonial era.<sup>209</sup> The judicial function of legal interpretation and application has a quasi-legislative effect, creating precedents that must be followed in subsequent cases with similar facts. This process of “judicial legislation” in both common law and statutory interpretation contributes to legal development.<sup>210</sup> In England and the United States, besides the enduring impact of the doctrine of binding precedent, judge-made law has often intervened in areas where the

<sup>205</sup> BOTS. CONST. §§ 105, 106.

<sup>206</sup> See *id.*

<sup>207</sup> No. 377 of 1999 (Misc. App. Nov. 23, 2001) (Bots.).

<sup>208</sup> However, in recognition of this problem, on July 28, 2000, the government appointed a presidential commission to inquire into these sections and, among other goals, to “seek a construction that would eliminate any interpretation that renders the sections discriminatory.” See REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO SECTIONS 77, 78 AND 79 OF THE CONSTITUTION OF BOTSWANA 9 (2001). The Commission submitted its report in 2001, and in 2002, the government published a White Paper accepting some of the Commission’s recommendations. See generally Charles Manga Fombad, *The Constitutional Protection Against Discrimination in Botswana*, 53 INT’L & COMP. L.Q. 139–70 (2004). It should be noted that section 89 of the constitution provides a special procedure for amending the constitution. BOTS. CONST. § 89.

<sup>209</sup> See generally Justice Akinola Aguda, *Legal Developments in Botswana from 1885 to 1966*, 5 BOTS. NOTES & RECS 52–63 (1973); J.R. Crawford, *The History and Nature of the Judicial System of Botswana, Lesotho and Swaziland—Introduction and the Superior Courts* (pts. 1, 2), 86 S. AFR. L.J. 476 (1969), 87 S. AFR. L.J. 76 (1970); Bankie Forster, *Introduction to the History of the Administration of Justice of the Republic of Botswana*, 13 BOTS. NOTES & RECS. 89–100 (1981).

<sup>210</sup> As Lord Wilberforce stated in *British Railways Board v. Herrington*, “[T]he common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do.” [1972] 1 All E.R. 749, 778.

government has been unwilling to ask for legislation or has been too slow to propose new measures.<sup>211</sup> This is also true in Botswana.<sup>212</sup>

The second setting in which the judiciary performs legislative functions arises when parliament expressly authorizes the judiciary to legislate on certain matters. The best example of this appears in section 95(6) of the constitution, which states that "the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it."<sup>213</sup> On this basis, section 28 of the High Court Act provides the Chief Justice with wide-ranging powers to make rules as he deems necessary or desirable to facilitate the proper dispatch and conduct of the business of the High Court.<sup>214</sup>

The obvious advantage of this system is that, as legal experts, judges are better situated to understand the specific procedural problems needing resolution and the various ways to do so. It also expedites amendments of rules as needed, without requiring the complex and protracted legislative amendment process. Perhaps the greatest advantage of judicial rule-making here is the reinforcement of judicial independence. Even though made by judges, these rules of court, like all other forms of subsidiary legislation, must nevertheless fall within the powers conferred on them by the enabling legislation. Thus, in *Ngope v. O'Brien Quinn*, the Court of Appeal declared a rule made by the Chief Justice, acting under section 28 of the High Court Act, as *ultra vires* and therefore invalid.<sup>215</sup>

The exercise of judicial functions by the legislature, in contrast, has been limited because of the general desire of parliament to respect and preserve the prestige and independence of the judiciary. Neverthe-

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<sup>211</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding state-sanctioned segregation of public schools to be unconstitutional); *Brind & Others v. Sec'y of State for the Home Dep't*, [1991] 1 All E.R. 720, 725 (stating that the courts cannot undertake judicial review unless the Home Secretary's decision was "irrational" or "perverse"); *Conway v. Rimmer*, [1968] 1 All E.R. 874 (holding that, absent clear evidence that withholding information was in the public interest, disclosure was required).

<sup>212</sup> For example, in *Attorney General v. Unity Dow*, the court invalidated discriminatory provision of the Citizenship Act of 1992. [1992] B.L.R. 119, 125, 160. The legislature, however, did not amend the Act until 1995. Citizenship Amendment Act (1995).

<sup>213</sup> BOTS. CONST. § 95(6).

<sup>214</sup> High Court Act § 28. Similar powers have been conferred on the president of the Court of Appeal in section 16 of the Court of Appeal Act, with respect to proceedings before the Court of Appeal, although this is not expressly sanctioned by the constitution. Court of Appeal Act, Cap. 04:01, § 16 (1982) (Bots.).

<sup>215</sup> [1986] B.L.R. 335, *aff'd* [1987] B.L.R. 248.



less, the parliament can intervene and perform judicial functions in many ways and specific situations. The most common example of this is where some legal uncertainty or controversy over an issue arises. The parliament may intervene through an enactment that is declaratory or expository on the law. Such a declaratory statute is designed to resolve any doubts as to what the law is or is intended to be.

For example, in *State v. Ndleleni Dube*,<sup>216</sup> the High Court held that where the accused person provides police with material evidence as part of an inadmissible confession, that evidence is inadmissible against the accused person. Unhappy with this decision, parliament overrode it by passing the Criminal Procedure and Evidence (Amendment) Act of 1983.<sup>217</sup> Section 87(6) of the constitution, however, precludes parliament from enacting penal legislation with a retroactive effect, thus limiting the scope of retroactive declaratory statutes.<sup>218</sup> Absent this limitation, citizens have no vested right in any particular legal remedy and hence, parliament may change remedies, alter the rules of evidence, and generally modify the law as it sees fit and apply this to prior transactions.

The courts, however, retain the full right to interpret the law under the constitution. A curative act of parliament—such as legislation designed to change the decision in a particular case, or confirm judicial proceedings otherwise void for lack of jurisdiction—would constitute undue encroachment on the judicial domain and be declared void by the courts.<sup>219</sup> For similar reasons, parliament cannot declare by statute the intent of a former act, or prescribe a certain construction of a former act.<sup>220</sup> Likewise, parliament cannot by a statutory enactment declare an act either constitutional or void, although it can repeal or refuse to enact any law because it deems it unconstitutional, regardless of whether the courts declare it constitutional.<sup>221</sup> On the whole, parliament's extensive powers are tempered by a strong desire to avoid public perception that it is usurping judicial functions in a manner that undermines the judiciary's independence.

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<sup>216</sup> [1981] B.L.R. 175, 176; see NSEREKO, *supra* note 118, at 65 n.4.

<sup>217</sup> Criminal Procedure and Evidence (Amendment) Act (1983) (Bots.).

<sup>218</sup> In fact, section 10(4) of the constitution says that "no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence." BOTS. CONST. § 10(4).

<sup>219</sup> See BONDY, *supra* note 9, at 89.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

## CONCLUSION

What emerges from the preceding analysis is not only that the doctrine of separation of powers is a prominent feature of Botswana's constitutional system, but also that this doctrine is not merely an abstract theoretical and philosophical construct. Instead, it is a practical, workable principle that is as relevant today as it was when first formulated centuries ago. The threat of tyranny is as potent today as it was when Lord Acton warned famously that "power tends to corrupt, and absolute power corrupts absolutely."<sup>222</sup> The separation of power, whether in the American, British, or French sense, does not, as some critics suggest, require a rigid separation of the different organs of power into watertight compartments, but rather sufficient separation to forestall the dangers that are inherent in the concentration of powers.

The Botswana analysis demonstrates that the doctrine contains elements of universal validity that no country can afford to ignore in the arrangement of its governmental institutions. Although the doctrine of separation of powers alone cannot explain Botswana's outstanding and enviable record in Africa as a successful, liberal, multi-party, constitutional democracy, its impact cannot be ignored. The executive, especially the Office of President, is as powerful as any in Africa, but what sets Botswana apart from most other African governments is the considerable freedom with which the courts regularly review and invalidate irregular and illegal executive and legislative acts. Individuals who feel that their constitutional rights have been infringed have regularly resorted to the courts. In a recent case,<sup>223</sup> one party challenged the jurisdiction of the Industrial Court, arguing that it was subsumed under the executive arm of the state and thus in conflict with the doctrine of separation of powers embodied in the constitution. This judicial freedom places Botswana in marked contrast to many Francophone African countries, who copied the French model of the separation of powers, providing a much more limited vision of judicial independence.<sup>224</sup> Consequently, those governments regularly suffer no consequences for violations of their constitutions.<sup>225</sup>

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<sup>222</sup> VANDERBILT, *supra* note 9, at 37 (quoting JOHN EMERICH EDWARD DALBERG, LORD ACTON, *ESSAYS ON FREEDOM AND POWER* 335–36 (Gertrude Himmelfarb ed., 1972)).

<sup>223</sup> *Direng v. Furniture Mart (Pty) Ltd.*, [1995] B.L.R. 826. The court held that the arguments advanced to support the contention were misplaced, and that the mere appointment of judges by the executive did not compromise the independence of these judges.

<sup>224</sup> See generally Fombad, *supra* note 97 (referencing other discussions of the situation in Francophone Africa).

<sup>225</sup> See generally Fombad, *supra* note 163.

The simple fact that Botswana's constitution creates situations in which the same persons belong to more than one of the three organs of power, or that each of these organs to some extent control and exercise the functions of the other, does not by necessity contradict the doctrine of separation of powers. The special cases where an organ performs the functions of another, or interferes with the functions of the other are both explicit and implied by the nature of government itself. These special cases are determinable and limited; the doctrine would be meaningless if it could be circumvented completely and with impunity. The doctrine, as an important touchstone of constitutional democracy, appears to do no more than provide that particular functions, for practical purposes, belong primarily to a given organ of power, while simultaneously superimposing a power of limited interference by another organ to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic manner. In a modern age that stresses realism and political pragmatism rather than strict dogma, the doctrine of separation of powers facilitates unity, cohesion, and harmony within a system of checks and balances. It is clear that while the separation of powers on its own cannot guarantee constitutional democracy, where, as in Botswana, it exists and is allowed to work, it does so reasonably well and creates a more sustainable and feasible constitutional democracy.